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No. 316

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

GENERAL MOTORS CORPORATION, Petitioner

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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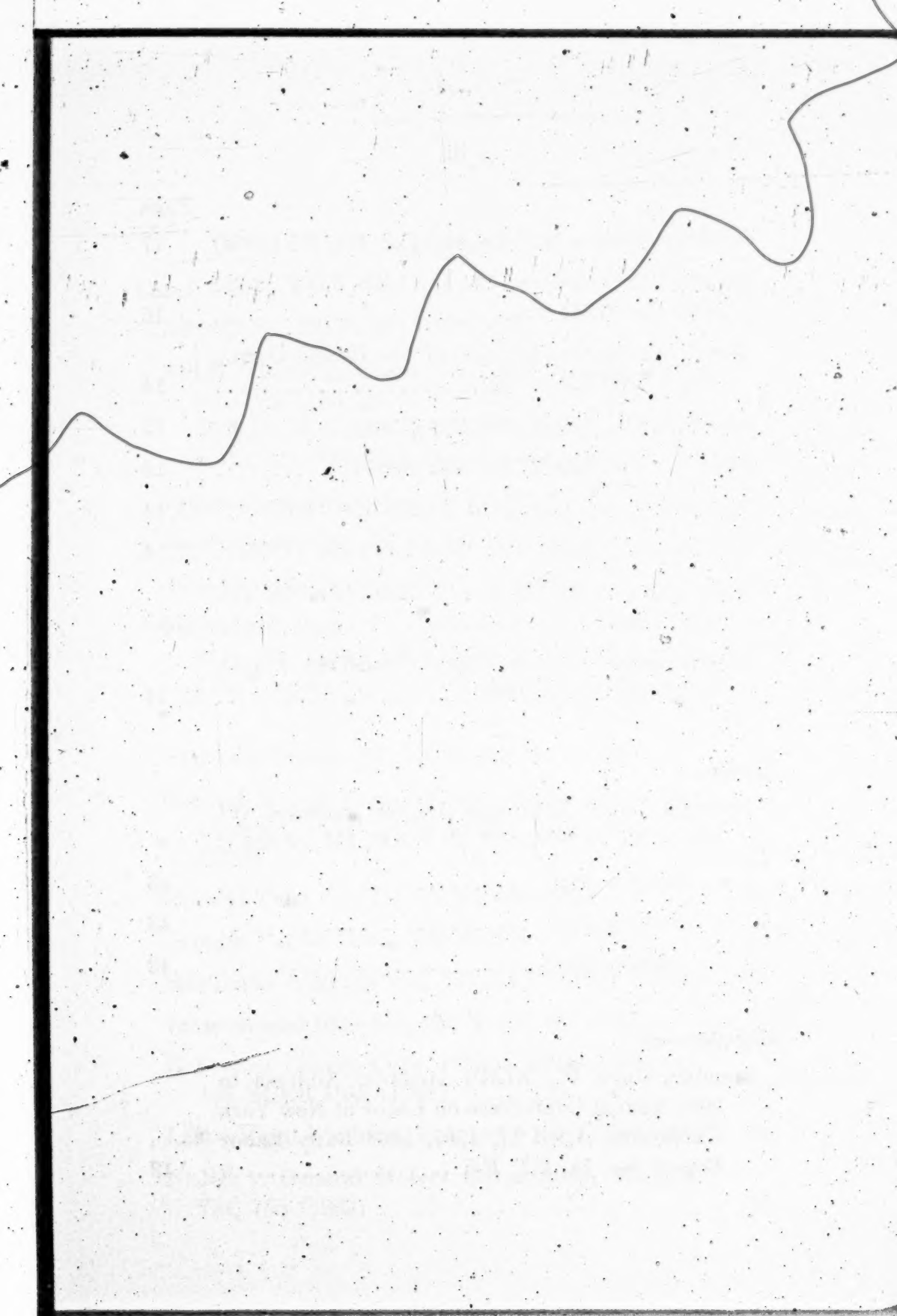

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, General Motors Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 3, 1967 and with respect to which rehearing was denied on April 4, 1967.

OPINIONS BELOW

The decision of the court of appeals (Appendix A, *infra*, pp. 21-23) is reported at ——— F.2d ———. The order of the court of appeals remanding the case to the Board for clarification of the Board's original decision and order is printed in Appendix B, *infra*, pp. 24-25. The Board's supplemental decision and order (Appendix C, *infra*, pp. 26-34) are reported at 158 NLRB No. 24, and its original decision and order are reported at 149 NLRB 396 (Appendix D, *infra*, pp. 35-42).

JURISDICTION

The opinion and judgment of the court of appeals was entered on March 3, 1967. A timely petition for rehearing *en banc* was denied on April 4, 1967.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTIONS PRESENTED

I. Where the bargaining agreement gave the Company sole and exclusive control over methods, processes and means of manufacturing, provided for the transfer of employes affected by changes initiated by the Company, contained an express and unqualified waiver of any obligation to bargain during the term of the agreement, and provided

[1] Circuit Judge Danaher dissenting.

for binding arbitration of disputes involving interpretation of the contract, did the court below err in reversing the Board and ruling that the Company was required to bargain with the Union in advance of changing its method of turning completed products over to a carrier at the end of the assembly line for shipment, despite the transfer, pursuant to the agreement and a negotiated settlement with the Union, of those employes whose jobs were thereby eliminated to comparable jobs elsewhere in the bargaining unit at that same location without any layoffs or discharges?

II. Did the court below err in refusing to give conclusive effect to the Board's ruling that there was no contracting out of work formerly performed by the Company's bargaining unit employes, where such ruling is supported by the findings of the Board and substantial evidence on the record considered as a whole showing that such work was eliminated by a change in the method of manufacturing, and not contracted out?

III. Did the court below err in reversing the Board's ruling that the Company was not required to bargain before effecting its methods change because there was no significant detriment to employes in the bargaining unit—all of the employes whose jobs were eliminated having been placed in comparable jobs elsewhere in the unit pursuant to the collective agreement and a negotiated settlement with the Union and without any layoffs or discharges?

IV. Did the court below err in refusing to give conclusive effect to the Board's ruling that the Company "by its 'overall conduct' fulfilled any claimed duty to bargain it purportedly had under the Act" where such ruling is supported by the findings of the Board and substantial evidence on the record considered as a whole showing that

the Union made no proposals for alternative methods of effecting the desired manufacturing changes after being notified in advance and that the parties, at the Union's request, negotiated to a mutually satisfactory settlement the placement of the affected employes?

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix E, *infra*, p. 43.

STATEMENT

I. The Board's Findings of Fact

Prior to June 17, 1963, new cars ready for shipment from the Company's South Gate, California automobile assembly plant were driven from the assembly line and parked by UAW bargaining unit drivers in the Company's OK parking lot adjacent to the plant (App. C, *infra*, p. 28, App. D, *infra*, p. 36; J.A. 152-153).[2] Thereafter, non-bargaining unit clerical employes in the Company's car distribution department performed the paperwork required to arrange these cars into tri-level railcar or truck haul-away loads destined for particular dealers or localities. As each load was arranged, UAW bargaining unit drivers drove the cars making up each load from their parking spaces in the OK lot to the shipping gate at one end of the lot where a final inspection was performed (App. C, *infra*,

[2] "J.A." refers to the Joint Appendix filed in the court of appeals. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

pp. 28-29, App. D, *infra*, pp. 36-37; J.A. 153-155). The cars were then turned over to employes of the carrier who drove them through the gate and reparked them in the carrier's lot adjacent to the OK lot until they could be loaded on haulaway trucks or rail equipment (App. C, *infra*, pp. 28-29, App. D, *infra*, p. 37; J.A. 155).

Because of inefficiencies and the excess wear and tear on new cars inherent in this load system of transfer to the carrier, all of which is conceded by the UAW, the Company decided to transfer the nonbargaining unit clerical work of making up the loads to the carrier,[3] to turn the cars assembled at South Gate over to the carrier in single units at a point nearer the end of the assembly line, to eliminate entirely the OK lot operation, and to lease the OK lot to the carrier in order to provide the carrier with more space in which to handle an impending influx of 4,000 additional cars per month to be shipped to South Gate from another of the Company's automobile assembly plants for reshipment from South Gate by the carrier. These changes were accomplished on June 17, 1963. Under the new arrangement, cars assembled at South Gate were turned over to the carrier near the end of the assembly line and parked only once before being loaded by the carrier onto haulaway trucks or rail equipment (App. C, *infra*, pp. 29-31, App. D, *infra*, pp. 37-38; J.A. 156-159, 180-187, 295).

As a result of this change in the method of turning cars over to the carrier and the elimination of the OK lot operation, the Company, pursuant to provisions of the collective bargaining agreement and under a negotiated settle-

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[3] With respect to the transfer of this work, the UAW states that it has "no complaint, for even while it was done by the Company, it was not done by bargaining unit employees." (UAW's original brief to the court of appeals, pp. 6-7.)

ment with the Union, transferred its former OK lot bargaining unit drivers to comparable jobs elsewhere in the unit at the same location (App. C, *infra,* pp. 33-34, App. D, *infra,* pp. 39-40; J.A. 288-289, 300). The Company did not lay off or discharge any UAW bargaining unit employes as a result of the methods change (App. C, *infra,* p. 32, App. D, *infra,* p. 41; J.A. 21, 63-64).

At the time the Company made these changes, there was in effect between the Company and the Union a three-year National Agreement negotiated in 1961; which provided in pertinent part (App. D, *infra,* pp. 39-41; J.A. 286, 288-290).:

> "(8) . . . the methods, processes and means of manufacturing are solely and exclusively the responsibility of the Corporation.
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> • • • • •
>
> "(59) When changes in methods, products or policies would otherwise require the permanent laying off of employes, the seniority of the displaced employes shall become plant-wide and they shall be transferred out of the group in line with their seniority to work they are capable of doing, as comparable to the work they have been doing as may be available, at the rate for the job to which they have been transferred.
>
> • • • • •
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> "(63) The transferring of employes is the sole responsibility of Management subject to the following: . . . ."[4]

The Union's Detroit staff was notified of the change under consideration as early as May 2, 1963, some six and

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[4] The restrictions on the Company's right to transfer employes specified in paragraph (63) involved such factors as merit, ability, capacity and seniority, none of which are relevant in this case (J.A. 289-290).

one-half weeks prior to June 17 (App. C, *infra*, pp. 33-34 App. D, *infra*, pp. 38-40; J.A. 34-35, 38). The local Shop Committee at South Gate was notified on June 4, some two weeks prior to the change (App. D, *infra*, p. 38; J.A. 79-80). The Company's plans for the proposed change were again presented in detail to the Union in a meeting at the South Gate plant on June 12 (App. D, *infra*, pp. 38-39; J.A. 198-198-g, 213-220).

At no time did the Union make any counter-proposals or alternate suggestions for effecting the desired changes, nor did it request any delay in implementation of the changes in order to develop an alternative plan (App. C, *infra*, p. 33; J.A. 198-g, 219).[5] The Union's position was simply that the Company had no right to change to single car shipping because, in its view, the change involved contracting out to the carrier the work of the OK lot drivers (App. D, infra, pp. 38-39; J.A. 111, 128).

The Company advised the Union that the change to single car shipping and elimination of the OK lot did not involve contracting out bargaining unit work, but rather was a change in the method of manufacturing encompassed by paragraph (8) of the agreement, sometimes referred to as the management rights clause (App. D, *infra*, pp. 38-39; J.A. 198-d, 215).

At the same time, the Company expressed its willingness to have this dispute over the scope of the management

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[5] Subsequent to June 12, the only meetings the UAW requested were for the sole purpose of negotiating with respect to its objections concerning placement of the OK lot drivers whose jobs had been eliminated. This issue was ultimately resolved by the parties in a series of meetings on June 13, 18, 19 and 20 (App. C, *infra*, pp. 33-34, App. D, *infra*, pp. 39-40; J.A. 225-226, 300).

rights clause tested in the contractual grievance procedure (App. D, *infra*, p. 39; J.A. 111-112).[6]

The Union chose not to pursue the arbitration route but rather filed unfair labor practice charges on June 14, 1963 alleging in substance that the Company had refused to bargain about a unilateral decision to contract out bargaining unit work in violation of sections 8(a)(5) and (1) of the Act (J.A. 276).

II. The Board's Original Decision and Order

A complaint was issued by the general counsel on January 27, 1964. On May 5, 1964, the trial examiner issued his decision finding a violation of the Act as alleged. Exceptions were filed by the Company with the Board. On October 30, 1964, the Board, in disagreement with the trial examiner, issued its decision and order dismissing the complaint in its entirety (App. D, *infra*, pp. 35-42).

Predicating its dismissal, in part, on the management rights provisions of the 1961 National Agreement, the Board held (App. D, *infra*, p. 41):

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[6] The 1961 National Agreement contained the following provisions with respect to the resolution of disputes involving questions of contract interpretation (J.A. 288):

> "(55) Any issue involving the interpretation and/or the application of any term of this Agreement may be initiated by either party directly with the other party. Upon failure of the parties to agree with respect to the correct interpretation or application of the Agreement to the issue, it may then be appealed directly to the Umpire as provided in Paragraph (43).
>
> * * * * *
>
> "(53) There shall be no appeal from the Umpire's decision, which will be final and binding on the Union and its members, the employe or employes involved and the Corporation."

"That Respondent retained the freedom to make such changes is evident from paragraph (8) of the National Agreement which reserved, as the 'exclusive responsibility' of Respondent, actions and decisions concerning 'the method . . . . and means' of its operation. Similarly, Respondent's right unilaterally to make changes is clear from paragraph (59), wherein the parties agreed upon a procedure for the transfer of employees who would otherwise be laid off by 'changes in methods, products, or policies.' In addition, exclusive management rights in this regard are further provided for in paragraph (63) which states that 'the transferring of employees is the sole responsibility of Management . . .' subject to such factors as seniority.

"We conclude that Respondent's changes respecting the OK lot and the department 66 drivers were within the scope of its managerial prerogative as explicitly recognized by the Union in the National Agreement."[7]

III. The Remand Order of the Court

The Union sought review of the Board's decision and order in the court below. On October 1, 1965, the court entered its order remanding the case to the Board for clarification "as to the precise holding of the Board in the following particulars" (App. B, *infra*, pp. 24-25):

"(1) Did the Board find there was contracting out to Pacific Motor Trucking of work formerly performed by the bargaining unit?

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[7] The Board also found "it significant that, to the extent that the Union may have had a grievance as to the change, the grievance was fully discussed between management and the Union, particularly at the four meetings of local management and the shop committee from June 13-20, and was resolved by a settlement worked out at these meetings" (App. D, *infra*, pp. 41-42).

"(2) Did the Board hold that the management clause of the bargaining agreement authorized contracting out without collective bargaining?

"(3) Did the Board find that, although some contracting out occurred, there was no significant effect upon the bargaining unit because

(a) there were no immediate layoffs?

(b) The amount of contracting out was *de minimis*?

(c) for any other reason?"

IV. The Board's Supplemental Decision and Order

On April 20, 1966 the Board issued a supplemental decision and order wherein it answered each of the court's specific questions on remand as follows (App. C, *infra*, pp. 26-34):

(1) "The Board did not find, and it does not now find, that there was contracting out to PMT of work formerly performed by the bargaining unit." (App. C, *infra*, p. 27.)

(2) "Noting, . . . that Respondent's action was a change in method of operation rather than 'contracting out,' the Board held, and now reaffirms that holding, that the Respondent's action was 'authorized' by the management clause of the collective-bargaining agreement." (App. C, *infra*, p. 28.)

(3) ". . . the record does not establish that department 66 employees or any other employees in the unit suffered any significant detriment from Respondent's abolition of department 66. As the Board indicated in its earlier decision, the mere reassignment of an employee to another

> unit job does not by itself necessarily constitute significant detriment to the employees in the bargaining unit requiring that the employer bargain collectively before effecting such a change." (App. C, *infra*, p. 32.)

Based upon its findings that there were a series of meetings with the Union during the six-week period preceding the change wherein although "the Union had advance notice of the change and had ample opportunity to discuss and protest" it "made no counterproposals and proceeded on June 13 to settle its differences with management as to the effect of the change of method," the Board further held:

> ". . . that, whether or not the projected change of method falls within the category of 'contracting out,' Respondent by its 'overall conduct' fulfilled any claimed duty to bargain it purportedly had under the Act." (App. C, *infra*, pp. 33-34.)

V. The Decision of the Court of Appeals

Thereafter, on March 3, 1967, following further oral argument in the court below, the court entered its judgment reversing the Board's order (App. A, *infra*, pp. 21-23). The court summarily rejected the Board's finding that there was no contracting out of bargaining unit work stating simply, "We think the evidence does not support this finding" (App. A, *infra*, p. 22).[8]

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[8] The UAW has conceded that if there was no subcontracting of unit work by the Company, then the June 17 change to single car shipping was encompassed by the management rights clause (App. C, *infra*, p. 30, UAW's original brief to the court of appeals, p. 37).

The court then held:

> ". . . the change had an adverse impact on the bargaining unit since it diminished by six the whole number of jobs performed by its members. This was not a mere *'de minimis'* violation of the employer's duty to bargain with the union." (App. A, *infra*, p. 22.)

Finally, the court held:

> "The agreement that 'the methods, processes and means of manufacturing are solely and exclusively the responsibility of the Corporation' is certainly not a 'clear and unmistakable' waiver of the union's right to bargain where a change in methods amounts in fact to contracting out." (App. A, *infra*, p. 23.)

The court disregarded completely the Board's wholly independent finding in support of its dismissal that the Company "by its 'overall conduct' fulfilled any claimed duty to bargain it purportedly had under the Act."

A timely petition for rehearing *en banc* was denied on April 4, 1967.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below not only constitutes an unwarranted extension of this Court's 1964 holding in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964),[9] but also repudiates virtually the entire line of Board decisions defining the duty of employers to bargain over decisions to subcontract work or otherwise alter their

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[9] Aff'g 322 F.2d 411 (D.C. Cir. 1963), enforcing 138 NLRB 550 (1962).

business operations under the *Fibreboard* rule.[10] In doing this, the court below erroneously substitutes a *per se* approach for the overall evaluation of the total circumstances surrounding the employer's action called for by this Court and by the Board in deciding cases involving this sensitive area of potential labor-management controversy.

Since *Fibreboard,* the Board has repeatedly pointed out that its "condemnation in *Fibreboard* and like cases of the unilateral subcontracting of unit work was not intended as laying down a hard and fast new rule to be mechanically applied regardless of the situation involved."[11]

The Board has thus excused unilateral employer action where the terms of the bargaining agreement clearly authorized the action taken;[12] where the action had no significant adverse impact on employes in the unit;[13] where

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[10] See *General Tube Co.*, 151 NLRB 850 (1965); *Allied Chemical Corp. (National Aniline Division)*, 151 NLRB 718 (1965), aff'd *sub nom, District 50, United Mine Workers, Local 13942 v. NLRB*, 358 F.2d 234 (4th Cir. 1966); *American Oil Co.*, 151 NLRB 421 (1965); *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574 (1965); *Shell Oil Co.*, 149 NLRB 305 (1964); and address of NLRB Member John H. Fanning, 20th Annual Conference on Labor at New York University, April 17, 1967, *1967 Daily Labor Report No. 74*, F-1, F-5.

[11] *Westinghouse Electric Corp. (Mansfield Plant)*, *supra*, note 10, at p. 1576. See also Mr. Justice Stewart's concurring opinion in *Fibreboard*, 379 U.S. 203, 217-226.

[12] *International Shoe Co.*, 151 NLRB 693 (1965); *Ador Corp.*, 150 NLRB 1658 (1965); *Shell Oil Co.* 149 NLRB 283, 289 (1964); and *Kennecott Copper Corp. (Chino Mines Division)*, 148 NLRB 1653 (1964).

[13] *American Oil Co.*, 152 NLRB 56 (1965); *General Tube Co.*, 151 NLRB 850 (1965); *Allied Chemical Corp. (National Aniline Division)*, 151 NLRB 718 (1965), aff'd *sub nom, District 50, United Mine Workers, Local 13942 v. NLRB*, 358 F.2d 234 (4th Cir. 1966); *American Oil Co.*, 151 NLRB 421 (1965); *The Fafnir Bearing Co.*, 151 NLRB 332 (1965); *Superior Coach Corp.*, 151 NLRB 188 (1965); and *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574 (1965).

the employer's action did not involve a departure from previously established operating practice,[14] and where an overall evaluation of the conduct of the parties, both before and after taking the action, disclosed a willingness by the employer to meet with the union and to negotiate a settlement of any issues raised by the union, or a failure of the union to request bargaining or to advance counterproposals or alternatives.[15]

The Board's dismissal of the complaint herein was predicated upon the existence of precisely such circumstances as these. In reversing the Board, the court below, in effect, held that the Board's empirical development of the *Fibreboard* rule has been erroneous *in toto,* and that the Board has in fact read *Fibreboard* too narrowly. The negative impact of the decision below on established Board law in this area and the confusion generated thereby among members of both labor and management clearly requires that this Court provide further clarification of the obligations of participants in the bargaining process by reviewing the issues in this case which were not resolved by the Court's *Fibreboard* decision.

From the record herein, it is patently clear that this is not another *Fibreboard* case. First, unlike *Fibreboard,* the instant case arose during the term of a collective bargaining agreement which not only granted to the Company the exclusive right to effect the change in its method of

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[14] *Allied Chemical Corp. (National Aniline Division), The Fafnir Bearing Co., Superior Coach Corp., Westinghouse Electric Corp. (Mansfield Plant), supra,* note 13, and *American Oil Co.,* 151 NLRB 421 (1965).

[15] *American Buslines, Inc.,* 164 NLRB No. 136 (1967); *Fruehauf Trailer Co.,* 162 NLRB No. 3 (1967); *New York Mirror (Division of The Hearst Corp.),* 151 NLRB 834 (1965); *Georgia-Pacific Corp.,* 150 NLRB 885 (1965); *Lasko Metal Products Inc.,* 148 NLRB 976 (1964); and *Hartmann Luggage Co.,* 145 NLRB 1572 (1964).

operation which was made, but also expressly provided for the transfer to other jobs of the employes whose work was eliminated by that change (J.A. 286, 288-289). The agreement, in addition, contained an express and unqualified waiver of any obligation to bargain during the term of the agreement (J.A. 291).

Second, unlike *Fibreboard,* there were in the instant case no layoffs or discharges by the Company (App. C, *infra,* p. 32, App. D, *infra,* pp. 39-40; J.A. 21, 63-64). All of the affected OK lot drivers were absorbed in comparable jobs elsewhere in the bargaining unit, pursuant to paragraph (59) of the GM-UAW National Agreement and a negotiated settlement with the Union (App. C, *infra,* p. 33, App. D, *infra,* pp. 39-40; J.A. 288-289, 300). The complete absence of any loss of jobs by employes in the bargaining unit was expressly noted by the Board in its dismissal of the complaint (App. C, *infra,* p. 32).

Although agreeing with the Board's finding in this regard, the court below flatly rejected its significance. Instead, the court fashioned a new test, holding simply that because there was a numerical reduction by six in the number of job assignments in which employes in the bargaining unit could be placed, "the change had an adverse impact on the bargaining unit."[16] Neither *Fibreboard,* nor any of the subcontracting cases decided by the Board since *Fibreboard,* provides any basis for concluding that a union has a bargainable interest in management decisions which reduce or realign the work tasks or job assignments of unit

[16] The bargaining unit in question is company-wide and includes in excess of 325,000 employes in more than 120 of the Company's plants. See *General Motors Corporation, Cadillac Motor Car Division, et al.,* 120 NLRB 1215, 1218-1221 (1958), and *NLRB v. General Motors Corporation,* 373 U.S. 734, 735 (1963).

employes where such changes have no adverse economic impact on existing employes.[17]

Third, whereas, in *Fibreboard* the union was, for all practical purposes, afforded no advance notice of the employer's intentions, here, as the Board found, the Company first notified the Union of its plans more than six weeks prior to June 17 and thereafter met twice with the Union to explain fully the proposed change to single car shipping (App. C, *infra*, p. 33, App. D, *infra*, pp. 38-40; J.A. 34-35, 38, 79-80, 198-198-g, 213-220, 285). The court below completely ignored this advance notice, as well as the Union's failure to suggest any counter-proposals or alternative actions, or to request a delay in implementation of the decision. The court likewise ignored the good faith bargaining which occurred at the Union's request concerning placement of the OK lot drivers in other bargaining unit jobs.

Fourth and finally, the lower court failed to recognize that, unlike *Fibreboard*, the fundamental issue in this case centered around a dispute between the parties over the interpretation and meaning of the management rights provisions of the National Agreement and that, although the parties expressly provided for final and binding arbitration of just such disputes in their agreement (J.A. 286-288), the Union chose to bypass the grievance and arbitration procedure.

The conclusion is inescapable that this case is not controlled by the *Fibreboard* decision, since the critical facts

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[17] In direct conflict with the novel theory thus advanced by the court below, both the First and Fourth Circuits in *Puerto Rico Telephone Co. v. NLRB*, 359 F.2d 983 (1st Cir. 1966), and in *District 50, United Mine Workers, Local 13942 v. NLRB*, 358 F.2d 234 (4th Cir. 1966), have held that employers are under no duty to bargain business decisions where there is no immediate adverse effect upon employes in the unit. In neither of these cases were there any layoffs or discharges of employes.

herein present issues which were neither raised nor contemplated in that case. In disregarding the obvious distinctions between the two cases, the court below misapplied the *Fibreboard* rule and inferentially overturned established Board law in an area involving important questions affecting the administration of national labor policy, wherein the expertise of the Board is entitled to great weight. Petitioner respectfully submits that the decision below merits this Court's review on certiorari, pursuant to Rule 19(1)(b) of the Court's Rules.

2. An additional ground for granting certiorari herein arises from the lower court's complete disregard of the substantial evidence rule enunciated by this Court in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).[18]

This Court has repeatedly admonished against the practice of substituting the judgment and choice of the reviewing court for that of the Board in evaluating the evidence in the record. Despite these admonitions, in the instant case, the lower court summarily rejected the Board's findings and substituted its own, even though those of the Board were clearly supported by substantial evidence on the record considered as a whole. Furthermore, the court's substitution was initiated without any review of the evidence or any real discussion of any infirmities in the Board's findings. Any decision which so departs from the established standards by which appeals courts are governed in Labor Board review proceedings pleads for an exercise of this Court's power of supervision.

In twice dismissing the complaint in its entirety, the Board made two critical findings: (1) that there was no

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[18] See also *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 405 (1962).

"contracting out to PMT of work formerly performed by the bargaining unit" (App. C, *infra,* p. 27), and (2) that the Company "by its 'overall conduct' fulfilled any claimed duty to bargain it purportedly had under the Act." (App. C, *infra,* p. 34).

The court below rejected the first of these findings out of hand and ignored the second.

The record herein is completely barren of any testimony or evidence from which it can reasonably be inferred that work formerly performed by UAW represented drivers has been subcontracted to, and is now being performed by the carrier. On the contrary, the work of the UAW drivers was clearly eliminated in a methods change, as found by the Board. The record shows that cars are now delivered to the carrier and parked only once preparatory to loading (always a carrier function), instead of being parked once by UAW drivers preliminary to delivery to the carrier and then reparked by the carrier before being loaded onto haulaway equipment (J.A. 177-179, 181-183, 193-194). The evidence also shows that the carrier has the same number of employes in relation to the number of units which it is handling as before (J.A. 184-186, 295).

Moreover, there is a complete absence of any evidence to indicate that the Company is paying the carrier anything additional to perform the alleged subcontracted work. Indeed, there is not a scintilla of evidence concerning any contractual arrangement between the carrier and the Company covering the work which is alleged to have been contracted out, but which was actually eliminated by a change in the method of delivery.

On the other hand, if the evidence were susceptible of varying inferences in this regard, including an inference that the extra driving and parking did not disappear, but

rather was subcontracted to the carrier, it has been made abundantly clear by this Court "that even as to matters not requiring expertise a court may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

There is likewise ample record support for the Board's finding that the Company "by its 'overall conduct' fulfilled any claimed duty to bargain it purportedly had under the Act." The record substantiates that the Union was afforded more than six weeks advance notice of the methods change (J.A. 34-35, 38), that two meetings were held in advance of the change wherein the Company explained its plans in detail (J.A. 79-80, 198-198-g, 213-220, 285), that the Union at no time made any counter-proposals or requested further bargaining or a delay in implementation of the change (J.A. 198-g, 219), that the Company was willing to submit the issue of contract interpretation to arbitration as provided for by the parties in their collective agreement (J.A. 111-112), and that the parties ultimately resolved on a mutually satisfactory basis the only questions raised by the Union for negotiation concerning placement of the OK lot drivers (J.A. 288-289, 300).

Petitioner submits that the arbitrary disregard shown by the court below for these fully supported Board findings justifies the granting of review on certiorari by this Court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

ALOYSIUS F. POWER,
HARRY S. BENJAMIN, JR.,
EUGENE L. HARTWIG,
GEORGE CHERPELIS,
K. DOUGLAS MANN,
Attorneys for General Motors Corporation.

June 30, 1967.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19156

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT
GENERAL MOTORS CORPORATION, INTERVENOR

On Further Proceedings Subsequent to Remand to the National Labor Relations Board

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Decided March 3, 1967

Before BAZELON, *Chief Judge,* EDGERTON, *Senior Circuit Judge,* and WRIGHT, *Circuit Judge.*

EDGERTON, *Senior Circuit Judge:* This case is here following our remand to the Board for clarification of its opinion which accompanied its order dismissing the union's complaint against the employer, General Motors. The union charged violation of § 8(a) (5) and (1) of the National Labor Relations Act, 61 STAT. 136, as amended, 29 U.S.C. § 158(a) (5) and (1).

New cars awaiting shipment at the company's Southgate, California, plant were parked in two successive steps. The first part of the parking operation was done by employees of the employer who were members of a unit with which the employer had a collective bargaining agreement. The second part of the operation was done by employees of a different concern which had a contract with the company. The agreement between the union and the employer provided that "the methods, processes and means of manufacturing are solely and exclusively the responsibility of the Corporation."

The Company has made a contract by which the entire parking operation is to be performed by employees of the concern which had been performing only the second part of it. In response to a question that we asked, the Board found on remand that the change in the company's method of shipping cars did not involve contracting out work formerly performed by the union. We think the evidence does not support this finding. Though the change of method "achieved substantial efficiencies," as the union concedes, the change was accomplished through a contracting out. It took away the jobs of six members of the union. Though these men got similar jobs elsewhere in the plant, the change had an adverse impact on the bargaining unit since it diminished by six the whole number of jobs performed by its members. This was not a mere *"de minimis"* violation of the employer's duty to bargain with the union.

In *District 50, United Mine Workers v. NLRB*, 358 F.2d 234 (1966), the Fourth Circuit Court of Appeals sustained the Board's approval of contracting out, on the ground that "the Board was entitled to conclude that there was no substantial adverse impact on the employees caused by the employer's subcontracting decisions." 358 F.2d at

237. And in *Puerto Rico Telephone Co. v. NLRB*, 359 F.2d 983, 988 (1966), the First Circuit overruled part of a Board order against an employer because the court found no evidence "that the bargaining unit or any employee in it" was "adversely affected as a direct result" of the contracting out. But in those cases, unlike the present case, the contracting out did not reduce the whole number of jobs in the bargaining unit. We think this case is controlled by *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), which affirmed 116 U.S.App.D.C. 198, 322 F.2d 411 (1963). The Supreme Court held that the "contracting out," which replaced employees in a bargaining unit with employees of an independent contractor, violated §§8(a) (5) and 8(d) of the Act, which require employers to bargain with respect to "wages, hours, and other terms and conditions of employment," although the only purpose of the contracting out was to reduce costs.

The Board has said that a union will not be held to have waived a statutory right unless the waiver is "clear and unmistakable." *E.g., California Portland Cement Co.*, 101 N.L.R.B. 1436, 1439 (1952); *Hekman Furniture Co.*, 101 N.L.R.B. 631, 632 (1952); *Tide Water Associated Oil Co.*, 85 N.L.R.B. 1096, 1098 (1949). See *NLRB v. Item Co.*, 220 F.2d 956, 958-59 (5th Cir.), *cert denied*, 350 U.S. 836 (1955). The agreement that "the methods, processes and means of manufacturing are solely and exclusively the responsibility of the Corporation" is certainly not a "clear and unmistakable" waiver of the union's right to bargain where a change in methods amounts in fact to contracting out. *Cf. Fafnir Bearing Co.*, 151 N.L.R.B. 332 n.1, 337, 341 (1965). Neither is it "clear and unmistakable" that "the methods, processes and means of manufacturing" include parking manufactured cars.

We must therefore reverse the Board's order.

Reversed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,156

International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), Petitioner

v.

National Labor Relations Board, Respondent

Before: BAZELON, *Chief Judge*, EDGERTON, *Senior Circuit Judge*, and WRIGHT, *Circuit Judge*.

ORDER

This cause came on to be heard on the record from the National Labor Relations Board and on petition to review an order of the National Labor Relations Board herein, and was argued by counsel;

And the court being uncertain as to the precise holding of the Board in the following particulars:

(1) Did the Board find there was contracting out to Pacific Motor Trucking of work formerly performed by the bargaining unit?

(2) Did the Board hold that the management clause of the bargaining agreement authorized contracting out without collective bargaining?

(3) Did the Board find that, although some contracting out occurred, there was no significant effect upon the bargaining unit because

(a) there were no immediate layoffs?

(b) the amount of contracting out was *de minimis*?

(c) for any other reason?

IT IS ORDERED BY the court that this case be, and it is hereby, remanded to the Board for clarification of its opinion. See *Government of Guam v. Federal Maritime Commission*, 117 U.S. App. D.C. 296, 329 F.2d 251 (1964).

IT IS FURTHER ORDERED that jurisdiction be retained by this court. See *Halpern v. F.C.C.*, 118 U.S. App. D.C. 28, 331 F.2d 774 (1964).

Per Curiam.

Dated: Oct. 1, 1965

APPENDIX C

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

General Motors Corporation,
Buick-Oldsmobile-Pontiac
Assembly Division
and
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), AFL-CIO

Case No. 21-CA-5401

SUPPLEMENTAL DECISION AND ORDER

On October 30, 1964, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] reversing Trial Examiner Howard Myers' Decision and dismissing the complaint in its entirety. In so finding, the Board held, contrary to the Trial Examiner, that Respondent did not violate Section 8(a) (5) and (1) of the Act by leasing the OK parking lot at its South Gate, California, plant, to Pacific Motor Trucking Company[2] on June 17, 1963, and transferring its department 66 drivers to other unit jobs because those actions constituted a change of method and work reassignment and as such were permitted by the managerial rights clause as well as other provisions of the contract with the Union.

Upon the Union's petition to review and set aside the Board's Order, the Court of Appeals for the District of

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[1] 149 NLRB 396.
[2] Herein called PMT.

Columbia Circuit[3] remanded the proceeding to the Board for clarification of its opinion. Pursuant to the Court's remand, the Board has considered the Trial Examiner's Decision, the exceptions to his Decision and briefs to the Board, the briefs to the Court, the briefs to the Board following the Court's remand order, and the entire record in the case.[4] The Board adheres to its dismissal of the complaint for the reasons set forth in its earlier decision as further explicated herein.

In its remand order, the Court asked the following questions:

1. Did the Board find there was contracting out to PMT of work formerly performed by the bargaining unit?

The Board did not find, and it does not now find, that there was contracting out to PMT of work formerly performed by the bargaining unit. As noted above, the Board did find in agreement with Respondent that the leasing of the OK lot to PMT on June 17 and its plan thereafter to transfer its 18 department 66 drivers to other jobs in the bargaining unit at the plant were not within the contemplation of the *Fibreboard* and *Town & Country* decisions[5] as such moves constituted a change of method without resultant layoffs or discharges and were permitted under the management provision of Respondent's National Agreement with the Union.

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[3] *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) v. N.L.R.B.* (C.A. D.C. No. 19, 156, October 1, 1965).

[4] The Union's request for oral argument before the Board is hereby denied as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

[5] *Fibreboard Paper Products Corp.*, 138 NLRB 500, enfd. 322 F.2d 411 (C.A. D.C.), affirmed 379 U.S. 203; *Town & Country Manufacturing Co., Inc.*, 136 NLRB 1022, enfd. 316 F.2d 846 (C.A. 5).

2. Did the Board hold that the management clause of the bargaining agreement authorized contracting out without collective bargaining?

Noting, as stated above, that Respondent's action was a change in method of operation rather than "contracting out," the Board held, and now reaffirms that holding, that the Respondent's action was "authorized" by the management clause of the collective-bargaining agreement. As the Board stated in its earlier decision, the OK parking lot, prior to June 17, adjoined the end of the assembly line and was used by Respondent for temporarily parking cars while its car distribution department, which consisted of non-unit clerical employees, made up the loads or groups of cars to be turned over to PMT at a later point for shipping. The other lot, which was adjacent to, but separated by a fence with a gate from the OK lot, was leased from Respondent for temporarily parking cars to be loaded on PMT haul-away trucks or multilevel rail carriers.

Upon approval of the assembled cars in Respondent's car conditioning department, employees in the bargaining unit, known as drivers of unlicensed cars, drove the cars to the end of the assembly line. Before June 17, 6 of the 18 employees in department 66, all of whom were also in the bargaining unit, then drove the cars to numbered "spots" in the OK lot, which they noted on the manifests that accompanied each car. The manifests were sent to Respondent's car distribution department, which made up the loads for various dealers, and were given to the other 12 department 66 drivers who drove the cars from the spots in the OK lot to the shipping building near the PMT lot. These 12 department 66 drivers then raised the hood and deck lid of the car, checked the battery to make sure there was a sufficient charge, emptied and partly refilled the

gasoline tank, and picked up certain uninstalled accessories from the shipping building and placed them in the trunk. The 12 drivers left the cars which were jointly checked by a plant protection employee of Respondent and a PMT checker, with the latter assuming responsibility for the cars on behalf of PMT. PMT employees classified as yard or gatemen came through the gate and drove the cars to the PMT lot where they were parked in aisles respectively designated for shipment by haulaway trucks or multilevel rail carriers. The PMT truck dispatcher allocated the haulaway loads to PMT truck drivers who loaded the cars on the trucks and drove the loads to the dealers. The PMT rail dispatcher instructed other PMT employees classified as loaders to load specific groups of cars on the rail carriers.

As indicated above, the OK lot was leased to PMT on June 17 and the two lots were consolidated into one PMT lot in order to permit Respondent to change its method of turning completed cars over to PMT from load shipping to single car shipping. With the leasing of the OK lot to PMT, the fence, which separated the two lots, was removed and the point of delivery of completed cars to PMT was moved from the old shipping building near the fence to a new shipping canopy located 35 to 40 feet west of the end of the assembly line.

The nonrepresented clerical employees in Respondent's car distribution department no longer performed the work of making up the loads which were to be shipped by PMT. As this function was now to be performed by PMT truck and rail dispatchers, Respondent after June 17 was able to turn cars over to PMT individually at the new delivery point as they came off the assembly line instead of waiting until loads of 4 or 12 cars were accumulated in the OK lot for truck or rail shipment. Since June 17, the nondriving

or service functions have been performed by assembly line employees of Respondent before the cars are taken by Respondent's drivers of unlicensed cars to the new shipping canopy. Here they are inspected by a plant protection employee of Respondent and a PMT checker. The cars are then turned over to PMT yard or gatemen who drive them to spots designated in the manifest either in the former OK lot for rail shipment or to the old PMT lot for shipment by truck. The manifests, which at this juncture are referred to as car shippers, go to the PMT truck and rail dispatchers who, in contrast to the pre-June 17 situation, are now responsible for making up the loads which are to be handled by PMT loaders and truckdrivers for shipment to dealers.

In sum, Respondent changed from load lot to single car shipping.

The Union in its brief to the Court conceded that the foregoing change "was a *genuine change in methods*" [Emphasis supplied.] And, although the Union originally objected to Respondent's action as bringing about the loss of 18 unit jobs, it also conceded in its brief to the Board on remand that the elimination of the jobs of the 12 department 66 drivers, who had been assigned to driving cars from the numbered spots in the OK lot to the shipping building near the pre-June 17 fence, was a permissible unilateral methods change under the management rights clause. However, the Union still contends that Respondent violated the Act in that the jobs of the other 6 department 66 drivers who, prior to June 17, drove cars from the end of the assembly line to the numbered spots on the OK lot, constituted work which was not eliminated but was instead improperly "contracted out" to PMT drivers without prior Respondent consultation with the Union. We do not agree.

The Union, as noted above, conceded that the change from load lot to single car shipping was a "genuine change in methods." The Board found that this change was not a mandatory bargaining subject as it was permitted by paragraph (8) of the National Agreement which reserved, as the "sole responsibility" of Respondent, actions and decisions concerning "the methods . . . and means" of its operations.[6] Respondent, in the exercise of its contractual right to do so, eliminated department 66. Its action was not merely to remove some driving functions from that department. Thus, the driving work, which is now performed by PMT employees, is an aspect of the new delivery system and not a residual function of department 66.

For these reasons the Board found in its earlier decision, and hereby reaffirms its finding, that Respondent's elimination of department 66 did not violate Section 8(a)(5) and (1) of the Act, as such conduct was authorized by the management clause of the bargaining agreement.

3. Did the Board find that, although some contracting out occurred, there was no significant effect upon the bargaining unit because

   (a) there were no immediate layoffs?

   (b) the amount of contracting out was *de minimis*?

   (c) for any other reasons?

Again noting that the Board viewed Respondent's action as a change in methods of operation within the mentioned management clause, the Board, as an additional ground for its dismissal of the complaint, relied upon the

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[6] See *Shell Oil Company*, 149 NLRB 283, 289, wherein it was found that an employer does not violate its duty to bargain when the unilateral action is "consistent" with the parties' collective-bargaining agreement.

fact that the change did not result in any significant detriment to the employees in the bargaining unit.[7] The Board reaffirms that position.

The Union conceded that the change from the load lot to the single car system "achieved substantial efficiencies . . . ." It does not appear from the record that there were any layoffs as a result of the change. Rather, the record shows that the department 66 employees were reassigned to other unit jobs at the same rate of pay when the department was eliminated. While it is true that some department 66 drivers were soon thereafter given unit work as drivers of unlicensed cars at a rate which was 5 cents below their previous rate, this was the direct result of an agreement between the Union and Respondent as to the transfer of these employees. Thus, the record does not establish that department 66 employees or any other employees in the unit suffered any significant detriment from Respondent's abolition of department 66. As the Board indicated in its earlier decision, the mere reassignment of an employee to another unit job does not by itself necessarily constitute significant detriment to the employees in the bargaining unit requiring that the employer bargain collectively before effecting such a change.[8]

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[7] See *Kennecott Copper Corp.*, 148 NLRB 1653, 1654, wherein the Board stressed "the fact that the Respondent's allegedly unlawful acts resulted in no significant detriment to the employees in the . . . unit . . . ." See, also, *Allied Chemical Corporation (National Aniline Division)*, 151 NLRB No. 76, affd. — F.2d — (C.A. 4), decided March 14, 1966.

[8] Moreover, as the Union now contends that only 6 of the department 66 employees were improperly affected by Respondent's conduct, the Board is reinforced in its original conclusion as to the minimal impact that resulted from the reassignment of this smaller number of employees. The Board has already pointed out that these department 66

(*Continued on next page*)

Finally, in support of its dismissal of the complaint, the Board relies upon the principle that the finding of an 8(a)(5) violation rests upon an "evaluation of the [Company's] overall conduct . . . ."[9] Here, as the Board stated in its earlier decision, there were a series of conferences between management and the Union during a 6-week period preceding the elimination of department 66. In the course of these discussions, Respondent clearly set forth its plans for the change in method and the Union stated its opposition thereto without, however, requesting any delay or suggesting alternative courses of action. The parties having thoroughly discussed the prospective change, the Local's shop committee at four meetings with plant management from June 13 to 20 concentrated on resolving their differences as to Respondent's assignment of department 66 drivers at their old rate of pay to assembly line jobs in the bargaining unit. It is thus clear from this record that the Union had advance notice of the change and had ample

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(Continued from preceding page)

drivers experienced no loss of jobs as they were given work in the unit. In addition, no evidence was adduced as to any demonstrable adverse impact on other employees in the unit which in all probability contained at least a majority of the 3000 employees at the South Gate plant. See *Westinghouse Electric Corp.*, (*Mansfield Plant*), 150 NLRB No. 136, wherein it was found that there was no obligation to bargain about changes which had "no demonstrable adverse impact" on employees in the unit.

Member Jenkins would advise the Court that inasmuch as the original decision did not find that there was contracting out of work, the degree of effect on the bargaining unit was not found in that decision to be significant; he does not now consider such effects or lack of them to be material to disposition of the case and would dispose of it on the grounds mentioned previously herein; but if he considered that there had been a contracting out of work, he would not find the effects to be *de minimis*.

[9] *Hartman Luggage Co.*, 145 NLRB 1572, 1573; see, also, *Westinghouse Electric Corp.* (*Mansfield Plant*), *supra*.

opportunity to discuss and protest Respondent's plan. It is also significant that the Union made no counterproposals and proceeded on June 13 to settle its differences with management as to the effect of the change of method.

In the light of these facts, the Board finds that, whether or not the projected change of method falls within the category of "contracting out," Respondent by its "overall conduct" fulfilled any claimed duty to bargain it purportedly had under the Act.

Accordingly, the Board affirms its dismissal of the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C. April 20, 1966.

John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD.

APPENDIX D

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

General Motors Corporation,
Buick-Oldsmobile-Pontiac
Assembly Division
and
International Union,
United Automobile,
Aerospace and
Agricultural Implement
Workers of America
(UAW), AFL-CIO

Case No. 21-CA-5401

DECISION AND ORDER

On May 5, 1964, Trial Examiner Howard Myers issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Trial Examiner's Decision attached hereto. Thereafter, Respondent, the Union, and the General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs, and the General Counsel also filed an answering brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case,

and hereby adopts the Trial Examiner's findings, conclusions, and recommendations only to the extent that they are consistent with this Decision and Order.

The Trial Examiner found that Respondent failed and refused to fulfill its bargaining obligation in violation of Section 8(a) (5) and (1) of the Act by not giving prior notice to or consulting with the Union when it leased the OK parking lot at its South Gate, California, plant, to Pacific Motor Trucking Co.[1] on June 17, 1963, and contracted with that firm to have the latter's employees do work which Respondent's drivers had previously performed. We disagree for the reasons given below.

The record shows that prior to June 17, 1963, an area near the plant was occupied by two parking lots. The OK parking lot in the western section of the area adjoined the end of the assembly line and was used by Respondent for temporarily parking cars while its car distribution department made up the loads to be turned over to PMT. The other lot, which was adjacent to but separated by a fence with a gate from the OK lot, was leased from Respondent by PMT for temporarily parking cars to be loaded on PMT haulaway trucks or multilevel rail carriers.

Upon approval of the assembled cars in Respondent's car conditioning department, employees in the bargaining unit, known as drivers of unlicensed cars, drove the cars to the end of the assembly line. Before June 17, 18 employees,[2] who were also in the bargaining unit, then drove the cars to numbered "spots" in the OK lot, which they noted on the manifests that accompanied each car. The manifests were sent to Respondent's car distribution de-

[1] Herein called PMT.

[2] Herein called department 66 drivers.

partment,[3] which made up the loads for various dealers, and were returned to the department 66 drivers who drove the cars from their spots in the OK lot to the shipping building near the PMT lot. These drivers then raised the hood and deck lid of the car, checked the battery to make sure there was a sufficient charge, emptied and partly refilled the gasoline tank, and picked up certain uninstalled accessories from the shipping building and placed them in the trunk.[4] PMT next assumed responsibility for the cars and its employees known as yard or gatemen came through the gate and drove the cars to the PMT lot where they were parked for PMT shipment by haulaway trucks or multilevel railcarriers as directed by PMT dispatchers.

As indicated above, the OK lot was leased to PMT on June 17, and the two lots were consolidated into one PMT lot. Since then the nondriving or service functions are performed by assembly line employees of Respondent before the cars are taken by drivers of unlicensed cars to the end of the assembly line where the cars and the manifests are turned over to PMT yard and gatemen[5] who drive the cars to spots designated in the manifest either in the former OK lot for rail shipment or to the old PMT lot for shipment by truck. The PMT driver then indicates in the manifest the spot in which the car is parked and returns to the end of the assembly line to pick up and park another car. The manifests, which at this point are referred to as car shippers, are turned over to the PMT truck or rail dis-

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[3] Employees therein were not in the bargaining unit.

[4] Department 66 drivers returned to their original starting point in the OK lot and once again picked up the newly assembled cars.

[5] The number of PMT yard and gatemen stood at 9 in January 1963, temporarily rose to 14 because of the "newness" of the consolidated operation, and was 10 in January 1964. PMT loaders increased from 26 to 40 after October 1963, because PMT then arranged to receive additional cars from Respondent's plant in Fremont, California.

patchers, who, in contrast to the pre-June 17 situation, now have the responsibility for making up loads which are to be handled by PMT loaders and truckdrivers. . .

The Union received definite information from Respondent about the contemplated change when, at the behest of Sherman Kelton, chairman of the shop committee at the South Gate plant, Frank James, an administrative assistant to Leonard Woodcock, vice president of the Union's General Motors Department in Detroit, telephoned Vernon M. Schneider, a Respondent official in Detroit, and was told on May 2 that "there was going to be definitely a move . . . . the jobs were going to be changed" in the OK lot. James protested that "this was our work; that management was wrong in giving the job to someone else." On June 3, James telephoned John Holmes, the personnel manager for Respondent's Buick-Oldsmobile-Pontiac entire assembly division, and told Holmes that the Union was still protesting any transfer of work at South Gate to PMT employees.

Although the Trial Examiner found that plant officials at South Gate during May 1963 denied knowing anything about the transfer plan, the former called a special management-shop committee meeting on June 4 at which South Gate officials advised the shop committee of its plan to commence "one-car shipments" to PMT in the near future.[6] The shop committee contended that the contracting out of jobs of department 66 drivers was in violation of the Local wage and National agreements as the jobs were within the bargaining unit.

On June 12, some UAW International representatives and members of the shop committee met at South Gate

[6] Paragraph (15) of the National Agreement provides for meetings "between representatives of the Local Management and the Shop Committee."

with Schneider, Bruce Buckley, personnel director at South Gate, and other plant representatives. Buckley stated that the OK lot had been leased to PMT and that, effective June 17, Respondent would be turning over its finished cars to PMT near the end of the assembly line, and department 66 drivers would no longer be working on the OK lot. Schneider stated that management was taking this action by virtue of paragraph (8) of the National Agreement[7] which deals with management rights. When International representative Burrows contended that the change did not come within the National Agreement, Schneider suggested that the Union had "a recourse to follow," namely, the grievance procedure.

At the request of the Local, special meetings were held between plant officials and the shop committee on June 13, 18, 19, and 20, to discuss Respondent's assignment of department 66 drivers at their old rate of pay to assembly line jobs in the bargaining unit. The Union contended that under paragraph (59) of the National Agreement[8] de-

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[7] Paragraph (8) reads: "The right to hire; promote; discharge or discipline for cause; and to maintain discipline and efficiency of employees, is the sole responsibility of the Corporation except that Union members shall not be discriminated against as such. In addition, the products to be manufactured, the location of plants, the schedules of production, the methods, processes and means of manufacturing are solely and exclusively the responsibility of the Corporation."

[8] Paragraph (59) reads: "Seniority shall be by non-interchangeable occupational groups within departments, group of departments or plant-wide, as may be negotiated locally in each plant and reduced to writing. It is mutually recognized by the parties that written local seniority agreements are necessary. All local seniority agreements and modifications or supplements thereto shall be reduced to writing and be subject to the approval of the Corporation and the International Union.

When changes in methods, products or policies would otherwise require the permanent laying off of employees, the seniority of the displaced employees shall become plant-wide and they shall be transferred out of the group in line with their seniority to work they are capable of doing, as comparable to the work they have been doing as may be available, at the rate for the job to which they have been transferred."

partment 66 drivers were entitled to "comparable work" as drivers of unlicensed cars. Management pointed out that the assembly line jobs paid the same rate as the jobs the department 66 drivers had been doing and that the rate for drivers of unlicensed cars was five cents less. In this connection, management took the position that paragraph (59) required that department 66 drivers be placed in those jobs in the unit which had a *comparable rate.*

The settlement of this dispute included the following: Management agreed with the Union's request to transfer the department 66 drivers to jobs as drivers of unlicensed cars and other classifications where the employees were capable of doing the job. The Union waived any claim for any difference in pay. Employees displaced by the transfers would be assigned pursuant to the Local Seniority Agreement and the Union would not process grievances on behalf of the employees displaced. Thereafter, on July 1, 1963, the shop committee presented to management a grievance, dated June 21, charging that the removal of the department 66 drivers from their jobs on the OK lot violated the National Agreement and requesting their return thereto. The shop committee took no further action in connection with this grievance which it withdrew on September 6, 1963. General Counsel stated at the hearing that he was not contending that management had refused to bargain about this grievance.

As indicated above, the Trial Examiner, in finding that Respondent was under an obligation to bargain with the Union concerning the OK lot, relied on *Fibreboard Paper Products*[9] and *Town & Country Mfg. Co.,*[10] wherein the

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[9] 138 NLRB 550, enfd. 322 F. 2d 411 (C.A. D.C.).

[10] 136 NLRB 1022, enfd. 316 F. 2d 846 (C.A. 5).

Board held that a management decision to subcontract work out of an existing unit, albeit for economic reasons, was a mandatory bargaining subject. Respondent contends that its plan to transfer the department 66 drivers to other jobs is not within the contemplation of the foregoing decisions as such a move was essentially a change of method without resultant layoffs or discharges and was permitted under the management rights provisions of its National Agreement with the Union. We find merit in this position.

It is clear from the foregoing that the reassignment of the department 66 drivers to other jobs in the same bargaining unit did not result in any substantial impairment of the bargaining unit. As already indicated, the nondriving or servicing functions of the department 66 drivers, which represented a sizeable part of their job, remained within the bargaining unit. That Respondent retained the freedom to make such changes is evident from paragraph (8) of the National Agreement which reserved, as the "exclusive responsibility" of Respondent, actions and decisions concerning "the method . . . and means" of its operation. Similarly, Respondent's right unilaterally to make changes is clear from paragraph (59), wherein the parties agreed upon a procedure for the transfer of employees who would otherwise be laid off by "changes in methods, products, or policies." In addition, exclusive management rights in this regard are further provided for in paragraph (63) which states that "the transferring of employees is the sole responsibility of Management . . ." subject to such factors as seniority.

We conclude that Respondent's changes respecting the OK lot and the department 66 drivers were within the scope of its managerial prerogative as explicitly recognized by the Union in the National Agreement. We also find it significant that, to the extent that the Union may have

had a grievance as to the change, the grievance was fully discussed between management and the Union, particularly at the four meetings of local management and the shop committee from June 13-20, and was resolved by a settlement worked out at these meetings.

Accordingly, we find, contrary to the Trial Examiner, that Respondent did not violate Section 8(a) (5) and (1) of the Act, as Respondent's leasing of the OK lot and transfer of the department 66 drivers pursuant to its managerial rights was a work reassignment and change of method under the provisions of the contract with the Union.[11]

ORDER

IT IS HEREBY ORDERED that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C. October 30, 1964.

Boyd Leedom, Member
John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member.

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[11] In view of our disposition of the case on this basis, it is unnecessary to pass on the other grounds relied on by the Trial Examiner in finding a violation of the Act.

Member Leedom joins his colleagues in finding no violation for the reasons which they have indicated. However, even accepting the Trial Examiner's theory of the case, i.e., that the situation here is embraced by the *Fibreboard* line of cases, he would, nevertheless, because of his dissenting position in this area, find no violation.

APPENDIX E

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * *

Sec. 10 * * * (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, . . . the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

SUPREME COURT, U. S.
No. 316

AUG 7 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

GENERAL MOTORS CORPORATION,
Petitioner,
v.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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August 3, 1967.

Interstate Brief & Record Co., 256 E. Congress St., Detroit, Michigan 48226
WO. 2-6711—WO. 2-6712

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Where contracting out permanently reduced the number of jobs in the bargaining unit by six, did the court below err in holding that the Company was not excused from bargaining on it, either because the effect was *de minimis*, or because the management clause, dealing only with methods changes, waived the Union's right to bargaining on contracting out?

STATEMENT OF THE CASE

The Facts

There was no dispute between the Board and the court of appeals as to the basic facts of this case, which are as follows.

Prior to June 17, 1963 finished cars assembled at the Company's Southgate, California plant were temporarily stored and then loaded for shipping in two distinct locations and in two series of operations, performed by two groups of employees—one employed by the Company and the other by an outside employer, PMT. The temporary storage operations were performed on the Company owned OK lot by the eighteen bargaining unit drivers in the Company's Department 66. The loading operations were performed by PMT employees on the PMT lot, which was immediately adjacent to the OK lot and leased to PMT by the Company. Finished cars were driven onto the OK lot and temporarily parked there by six of the Department 66 drivers. When enough cars for a load had thus been parked the remaining twelve drivers in Department 66 drove them to a gate in the fence that separated the OK and PMT lots. PMT employees called gatemen drove the cars through the fence and parked them together on the PMT lot. Other PMT employees called truck drivers and rail loaders then drove the cars onto haulaway trucks and rail cars on which they were transported to dealers in the Pacific coast area. (Appx C, pp. 28-29).[1]

On June 17, 1963 the Company consolidated the temporary storage and loading operations into one by leasing

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[1] Record references are all to the appendices included at the end of the Petition; i.e., "Appx A" refers to the court of appeals' decision, "Appx C" to the Board's supplemental decision, and "Appx D" to the Board's original decision. A reference included before the period for the sentence preceding it relates only to that sentence.

PMT the OK lot and removing the fence between the two lots, making them one, called the PMT lot. Finished cars are still driven out onto the lot and temporarily parked, but now they are driven directly from those parking spots straight onto the haulaway trucks and rail cars, rather than being parked a second time in preparation for loading, as before. (Appx C, pp. 29-30).

Under the new system all jobs are performed by PMT employees. The jobs of the twelve Department 66 drivers who drove the cars from the first parking spots to the gate have been eliminated, as have those of the PMT gatemen who drove the cars from the gate to the second parking spot, on the PMT lot. The jobs of driving the parked cars onto haulaways and rail cars are, of course, still performed and still by PMT employees. And the jobs of driving the cars out onto the lot and parking them are still performed, but no longer by the six Department 66 drivers who performed them in the past. These jobs are now performed by PMT gatemen. (Appx C, p. 30).

The Board characterized the transfer of this work to PMT as an "aspect" of the overall methods change (Appx C, p. 31). The Court of Appeals characterized it as contracting out (Appx A, p. 22).

The change of June 17 was preceded by a Company-Union meeting on June 12 at which the Company detailed what it was going to do on June 17. In response to the Union's protest, the Company replied that the management clause in the UAW-GM National Agreement gave it a contract right to do what it was going to do, so there was no point in discussing it (Appx D, pp. 38-39). Two days later, on June 14, the Union filed an unfair labor practice charge against the Company accusing it of violating Sections 8(a)(1) and (5) of the Labor Act by refusing to engage in collective bargaining on the proposed contracting out. On June 17 the Company put the change

into effect. On June 20, after four meetings on the subject, the parties agreed on placement and pay for the Department 66 drivers displaced by the change (Appx C, p. 33).

The Decisions Below

In its Supplemental Decision the Board assumed that six bargaining unit jobs had been transferred to PMT; however, it refused to call the transfer contracting out and characterized it instead as an "aspect" of the methods change (Appx C, pp. 30-31, 32 n.8). The Board reasoned that, since the Company's conduct was not contracting out but merely an "aspect" of the methods change, and since the management clause of the parties' National Agreement provides that "the methods, processes and means of manufacturing are solely and exclusively the responsibility of the Corporation", the Company was authorized to engage in the methods change, including this "aspect", and the Union had waived its statutory right to collective bargaining on the matter. The Board was at pains to make clear that since it had not found contracting out, it was not ruling that the Union had waived its rights to bargaining on contracting out. (Appx C, pp. 27-28).

The Board cited two additional grounds for its decision. First, it concluded that the change "did not result in any significant detriment to the employees in the bargaining unit", noting that it did not appear that "there were any layoffs as a result of the change" (Appx C, pp. 31-32). Finally, the Board noted that the Union had neither requested that the Company delay its action nor suggested any alternatives, and that, after the change, the parties reached agreement on placement and pay for the displaced Department 66 drivers. It characterized this conduct as fulfilling "any claimed duty to bargain" the Company had. (Appx C, pp. 33-34).

The court of appeals ruled that the management clause in the parties' agreement was not a "clear and unmistakable" waiver by the Union of its statutory right to collective bargaining on the action the Company had taken. The court called that action contracting out, noting that, "It took away the jobs of six members of the Union" (Appx A, p. 22). The court concluded that the "agreement that 'the methods, processes and means of manufacturing are solely and exclusively the responsibility of the Corporation' is certainly not a 'clear and unmistakable' waiver of the union's right to bargain where a change in methods amounts in fact to contracting out." The court particularly noted *Fafnir Bearing Co.*, 151 NLRB 332 n. 1, 337, 341 (1965), in which the Board ruled that virtually identical management clause language was not a waiver of the union's right to bargaining on contracting out. The court added, "Neither is it 'clear and unmistakable' that 'the methods, processes and means of manufacturing' include parking manufactured cars." (Appx A, p. 23).

On the "significant detriment", or *de minimis*, point, the court ruled that "the change had an adverse impact on the bargaining unit since it diminished by six the whole number of jobs performed by its members. This was not a mere '*de minimis*' violation of the employer's duty to bargain with the union." (Appx A, p. 22). With respect to both the discussions which preceded the change and the subsequent agreement concerning placement and pay for the displaced Department 66 employees, the court rejected the Board's characterization of them as fulfilling the Company's duty to bargain on the contracting out.

In summary, the points of difference between the Board and the court were as to the following: (1) whether the management clause was a "clear and unmistakable waiver" of the Union's right to bargaining on the Company's action; (2) whether that action was contracting out, or an "aspect" of the methods change; (3) whether the loss of

six bargaining unit jobs was *de minimis;* and (4) whether the discussions preceding the change and the subsequent agreement on placement and pay for the displaced employees satisfied the company's duty to bargain on the decision to contract out?

In both its original and supplemental decisions the Board treated this as a contract waiver case (Appx D, p. 41; Appx C, pp. 27-28); that is, one in which the central question is whether the parties' contract contains a clear and unmistakable waiver by the union of bargaining on the employer's action. The Board ruled there was a waiver because the Company's action was a methods change. The court ruled there was not a waiver because the Company's action was contracting out. As it states in the memorandum filed in this Court, the Board regards this case as turning on its own facts and as having no "broad sweep".[2]

ARGUMENT

The Decision Below is Correct and Presents no Important Question of Federal Law.

The Company's main reason for requesting the writ is so that this Court can review "the issues in this case which were not resolved by the Court's *Fibreboard* decision." However, the Company merely lists four factual differences between this case and *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, *affirming* 322 F. 2d 411 (D.C. Cir. 1963), and asks the Court to review this case because it is different from *Fibreboard.*[3] This, by itself,

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[2] Since the Board opposes review, we agree with its statement that it is a respondent before this Court. (See Board's Memorandum, p. 1, n.1).

[3] In stark contrast to the Company's now nearly total reliance on *Fibreboard* was its attitude toward that decision in the court of appeals. There it cited *Fibreboard* once in its supplemental brief and not even once in its principal brief.

is hardly reason for review. Moreover, as we shall demonstrate, the questions suggested by the factors the Company points to are either unimportant, were settled in *Fibreboard*, or have been settled in *NLRB v. C & C Plywood Corp.*, 385 U.S. 421.

First, the Company urges that in this case the collective bargaining agreement contains provisions (the management, transfer, and waiver clauses) which it contends waive the Union's statutory right to collective bargaining on contracting out. That the Company reads this particular agreement as including such a waiver while the court of appeals does not, hardly presents an important unsettled question of federal labor law, especially in view of (1) the Board's decision in *Fafnir Bearing Co.*, 151 NLRB 332 n.1, 337, 341 (1965), in which it read a management clause almost identical to the one involved here as *not* a waiver of the Union's right to bargaining on contracting out, and (2) *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 423 n.4, in which this Court affirmed the Board's ruling that a waiver clause virtually identical to the one here (waiving "the right . . . to bargain collectively with respect to any subject matter not . . . covered in this Agreement") did not waive the Union's right to bargaining on unilateral employer action not authorized by the contract.

Second, the Company points to the fact that in this case there were no layoffs or discharges.[4] But, six bargaining

[4] In a footnote the Company rather half-heartedly tenders an alleged conflict on this point with *Puerto Rico Telephone Co. v. NLRB*, 359 F. 2d 983 (1st Cir. 1966), and *District 50 United Mine Workers, Local 13942 v. NLRB*, 358 F. 2d 234 (4th Cir. 1966). But as the court below pointed out, those cases are not apposite for while there were no layoffs caused by the contracting out there, neither was there any reduction in the number of jobs in the bargaining units (Appx A, pp. 22-23).

Indeed, in *Puerto Rico Telephone, supra* at 988, the First Circuit indicated that *either* layoffs or a reduction in unit jobs triggers the bargaining duty:

> "In short, we cannot say . . . that the bargaining unit or any employee in it suffered a significant detriment or was otherwise adversely affected as a direct result of these two subcontracts."

unit employees, though they got similar jobs elsewhere in the plant, lost their parking lot driving jobs to PMT employees; and the total number of jobs in the bargaining unit available for unit employees was permanently diminished by six. In *Fibreboard, supra* at 215, this Court defined contracting out which is a mandatory subject for bargaining as: "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment". While there were no layoffs in *Fibreboard,* the Court's reliance (379 U.S. at 212-13) on *Teamsters Local 24 v. Oliver,* 358 U.S. 283, and *Timken Roller Bearing Co.,* 70 NLRB 500 (1946), *enforcement denied on other grounds,* 161 F. 2d 949 (6th Cir. 1947), in neither of which were there layoffs, makes it plain that where unit jobs have been lost, immediate layoffs are not a *sine qua non* of the statutory duty to bargain on contracting out.

Third, the Company points to the fact that in two meetings in advance of the change the Company explained it to the Union and the Union neither requested a delay nor proposed alternatives, and to the fact that after the change the parties agreed on placement for the displaced Department 66 drivers. But the Company omits mentioning that at the second of the two pre-change meetings the Company insisted it had a contractual right to do what it was going to do, so there was no point in discussing it, and also fails to note that the agreement on placement for the Department 66 drivers was reached *after* the Union had filed its unfair labor practice charge protesting the Company's refusal to bargain on the contracting out decision (see pp. 3-4 *supra*). That the Company regards this conduct as satisfying its bargaining duty while the court of appeals does not hardly presents an important question of federal labor law.

Fourth, the Company asserts that the fundamental issue in this case is one on which the Union could have gone to arbitration, and implies that the Board erred, therefore, in examining the parties' contract—a suggestion it makes for the first time here. But the fundamental issue in this case was whether the management clause contains a clear and unmistakable waiver of the Union's statutory right to bargaining on what the Company had done—an issue the Board has always viewed as within its competenec. This Court recently approved that view in *NLRB v. C & C Plywood Corp., supra,* rejecting the same point now urged by petitioner here. Cf. *NLRB v. Acme Industrial Co.,* 385 U.S. 482.

Finally, the Company claims the court of appeals' reversal of the Board was in violation of the "substantial evidence" rule of *Universal Camera Corp. v. NLRB,* 340 U.S. 474. But the two questions involved—whether what the Company did was contracting out, and whether its "overall conduct" fulfilled its duty to bargain on the contracting out decision—are not questions of fact or conflicting evidence—they are questions of law for resolution on undisputed facts. *Universal Camera* thus has no application; and, indeed, its application would not aid the Company, for the Trial Examiner, who heard the evidence, found that the Company *did* contract out and did *not* satisfy its duty to bargain about it. Thus, even if it were assumed *arguendo* that the court of appeals reversed the Board on findings of fact, it would be evident that the court's rulings were based "on the record considered as a whole", including the Trial Examiner's decision, and therefore not in contravention of *Universal Camera, supra* at 492-97.

Moreover, as this Court said in *Universal Camera, supra* at 490: "Our power to review the correctness of application of the present standard ought seldom to be called into action."

CONCLUSION

For the foregoing reasons respondent submits that the writ should not issue.

Respectfully submitted,

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August 3, 1967.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 316

GENERAL MOTORS CORPORATION, PETITIONER

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD[1]

Upon charges filed by the United Automobile Workers ("the Union"), the Board's General Counsel issued a complaint against petitioner General Motors

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[1] Although the Board has not been named as a respondent, it is such a party. The Board was the respondent in the court of appeals, and the proceeding is one to review its decision and order. If necessary, therefore, the caption should be amended to list the Board as a respondent.

Corporation, alleging that it had violated its bargaining obligation under Section 8(a)(5) and (1) of the National Labor Relations Act by making a change in its method of preparing cars for shipment without first bargaining with the Union. After full administrative proceedings, the Board dismissed the complaint. The Board found that the change did not involve the contracting out of work previously performed by employees in the bargaining unit, but was only a change in "the methods, processes and means of manufacturing" which, under the collective agreement between the Union and the Company, had been left to the Company's unilateral control. 149 NLRB 396, 158 NLRB No. 24 (Pet. 35-42, 26-34).

Upon the Union's petition to review, the court of appeals reversed, holding that this case was controlled by *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203. It ruled that the evidence did not support the Board's finding that the change did not involve the contracting out of work formerly performed by the Union, and that the "methods clause" of the collective bargaining contract did not constitute the "clear and unmistakable waiver of the union's right to bargain [which is necessary] where a change in methods amounts in fact to contracting out" (Pet. 23).

Although the Board agrees with petitioner that the court of appeals erred in reversing the dismissal of the unfair labor practice complaint, it believes that there is no occasion for review by this Court. The questions whether a particular change in operations

constitutes contracting out, whether the parties in fact have bargained thereover, and whether the operating changes substantially affect the job rights of the employees, ordinarily turn primarily upon the facts of the particular case. We believe that the decision of the court of appeals in this case is thus limited, and we do not read it as having the broad sweep petitioner ascribes to it. It was for this reason that the Board did not file a petition for certiorari and that it believes further review is unnecessary.

Respectfully submitted.

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JULY, 1967.

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